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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1921

No. ~~11~~ Original.

THE STATE OF NEW MEXICO,

v.

THE STATE OF COLORADO.

Brief for Defendant on Complainants' Motion to Strike Parts of Answer.

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THE STATE OF NEW MEXICO,

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THE STATE OF COLORADO.

Brief for Defendant on Complainants' Motion to Strike Parts of Answer.

STATEMENT OF THE CASE.

This is an original suit between the States of New Mexico and Colorado over the southern boundary line of Colorado and the northern boundary line of New Mexico.

The bill of complaint filed in this Court on the 29th day of October, 1919, by the State of New Mexico avers that the true and correct boundary line between said states is as shown by a resurvey made in the year 1902 by Howard B. Carpenter, a United States Surveyor, in pursuance of a contract with the United States entered into by him on the 17th day of July, 1902, and the instructions given to him by the then acting Commissioner of the General Land Office; and what purports to be a copy of said instructions, and also of the field notes of said survey are attached to and made a part of the bill.

The bill further avers that in disregard of said line the State of Colorado "has usurped jurisdiction over a considerable amount of territory south of said line and has unlawfully levied and collected taxes on property south of said line, and through its courts has attempted to exercise both civil and criminal jurisdiction over persons and property lying south of said line; but it is unable to state how far to the south of said boundary line the State of Colorado claims jurisdiction."

Relying wholly upon the survey made in 1902, New Mexico asks the Court to decree the said Carpenter line to be the true boundary line between the States of New Mexico and Colorado along the parallel of 37 degrees of North latitude.

Colorado has filed an answer and cross-bill. The answer admits that Carpenter made a resurvey in 1902, but denies that the line run by him, or as shown by his field notes is the true boundary line between New Mexico and Colorado; and avers that the Carpenter survey was never accepted or adopted by either the State of Colorado, or the Territory of New Mexico, and that an effort to have the same confirmed by Congress failed by reason of the disapproval of the President, a copy of whose veto message is attached to and made a part of the answer.

Colorado admits that it has exercised jurisdiction over a considerable amount of territory south of said Carpenter line, and has levied and collected taxes upon property south of said line, that is, to the original boundary line established by one E. N. Darling, in the year 1868, and no farther.

For further defense, subdivision V of the answer contains a plea in bar to the bill of complaint, which is hereinafter fully set forth.

For affirmative relief the cross bill avers that the true boundary line is fully and correctly shown and delineated in the field notes and survey made by Ehud N. Darling in 1868, which are attached to and made a part of the cross bill, adopts the allegations of fact contained in the answer, and further avers that Carpenter, in making his survey destroyed and obliterated many of the monuments and corners established by Darling.

Upon final hearing the court is asked to declare and decree the true southern boundary line of the State of Colorado, and the northern boundary line of the State of New Mexico to be the line established by Ehud N. Darling in the year 1868, and that the defendant have such other and further relief as may be found necessary to correctly restore, re-establish and re-mark the said Darling line as the boundary line between complainant and defendant. New Mexico has filed an answer to the cross bill, and a replication to defendant's answer and the issues in the case are made up.

However, the complainant now presents a motion to strike from the answer of defendant certain parts thereof upon the alleged ground that "the same are insufficient as a defense, or any part of a defense to the allegations of the bill of complaint, and set out matters which would be entirely irrelevant to any issue which can properly be raised in this case, and are therefore impertinent."

The case now comes on for hearing upon the complainant's said motion to strike out certain averments of the answer contained in subdivisions III and V.

I.

ARGUMENT AGAINST MOTION TO STRIKE.

It is obvious that the purpose of complainant's motion to strike is to test the sufficiency in law of said averments of the

answer. It is, in effect, equivalent to a demurrer thereto, and, in fact, it is admitted by counsel, that the motion is made under Rule 33 of the Rules of Practice for the Courts of the United States in Equity, which permits a motion to strike out in order to "test the sufficiency of an answer."

The complainant has filed a replication to the answer joining issue upon the facts averred in it. According to the English Chancery Practice, which this court has recognized and referred to as affording outlines for the practice herein, the complainant thereby admits that if the particular facts stated in the answer are true, they are sufficient in law to bar its recovery; and if they are proved to be true, the bill must be dismissed.

By replying to the answer the complainant admits that it is sufficient in law, and can not afterwards raise any question as to its sufficiency.

Farley v. Kittson, 120 U. S. 303, 314.
Mitford's & Tyler's Pleadings and Practice in Equity, 302, 303, 458.
Story's Eq. Pleading, Sec. 697.
Hughes v. Blake, 6 Wheat. 453, 472.
Rhode Island v. Mass., 14 Pet. 210, 257.

If, however, the English Rule shall not be followed, and notwithstanding the filing of the replication the Court shall consider the motion to strike upon the ground mentioned therein, it is our contention that for the purposes of this motion the answer must be taken as true, and that it is a complete defense to the bill of complaint.

II.

SUBDIVISION III.

That part of the answer which is contained in subdivision III, and against which the motion to strike is directed, reads:

> "But defendant avers that said Carpenter survey and his field notes of the said boundary line were never confirmed by the Congress of the United States, nor by

> either the State of Colorado, or the Territory or State of New Mexico, but that, on the contrary, an effort was made to confirm said Carpenter survey in the first session of the 60th Congress, by the introduction in the Senate of Senate Joint Resolution No. 78, which passed the Senate and House of Representatives, and was submitted to the President for his approval, and that the said Joint Resolution was on the 19th day of December, 1908, upon the advice of the Attorney General of the United States, disapproved by the President and returned to the Senate with his objections thereto, which resolution, upon the same day, was laid upon the table by the Senate, and no further action has since been taken thereon by Congress, and the said Carpenter survey, and boundary line as shown by said field notes, failed to become effective in any respect and was never recognized by the General Land Office of the United States as the boundary line between Colorado and New Mexico. A copy of said veto message of the President is hereto attached and made a part hereof."

It is admitted that Carpenter made an *ex parte* survey in 1902, but the mere fact that he made such a survey is of no binding force. Realizing this, his survey was reported to Congress and an effort was made to confirm the same and establish it as the boundary line by legislation, which of course could not be done inasmuch as the boundary line had previously been established and could not be changed by Congress without the consent of the State of Colorado, which was not given. The resolution shows that there was already a boundary line in force, and the purpose of confirming the Carpenter survey was to establish a new boundary line different from that then existing, which had been established in 1868. The disapproval of the President was based upon the opinion and advice of the Attorney General of the United States set forth in the veto message as follows:

> "I have the honor to report, with respect to joint resolution S. R. 78, referred by you to this department,

that the purpose of the said resolution appears to be to correct the boundary line between the Territory of New Mexico and the States of Colorado and Oklahoma. The practical effect of establishing the new boundary line, so far as the State of Colorado is concerned, would be to remove from the jurisdiction of that State and add to the Territory of New Mexico a strip along nearly the whole of the southern boundary of the said State, in which there are located at least five post-offices and an appreciable number of inhabitants.

So far as I am aware no action has been taken by the legislature of the State of Colorado assenting to or accepting the location of the boundary as proposed in this resolution, and from such inquiry as I have been able to make in the very limited time since the resolution reached me, I am led to think that such assent or acceptance on the part of the State is improbable. Under these circumstances, I think it is of very doubtful expediency to have the line mentioned in the resolution accepted by the United States as the true boundary. It is not necessary to express an opinion as to the legal effect of such a resolution upon the rights of the United States or of the Territory of New Mexico, or the duties of federal or territorial officers; but it is clear that the resolution would not be binding upon the State of Colorado, and its adoption might lead to conflicts of jurisdiction within the long strip of territory to which I have referred, and possibly to the escape from legal punishment of those guilty of crimes, committed within the said strip. If it is deemed desirable to establish the true boundary line, an appropriate method to effect this would be to invoke by appropriate proceedings, the original jurisdiction of the Supreme Court. I therefore respectfully advise that the joint resolution in question do not receive your signature."

The refusal of Congress to sanction the proposed change in the boundary, of course, left the boundary line as it then

stood, as it was when originally established by Darling in 1868, as it was when Colorado was admitted into the Union as a state, and as it has remained until the present time.

Neither Congress by directing a resurvey, nor the General Land Office by causing the survey to be made has performed an act which is binding upon the State of Colorado, in the absence of its recognition or ratification of these acts. Colorado was not represented in the making of the Carpenter survey, nor has it recognized, consented to, or ratified any of said unauthorized acts which were wholly *ex parte*.

This clearly refutes the claim made by complainant that the Carpenter survey is the true and correct boundary, and furthermore the presumption is that the original line which was established more than fifty years ago was correctly established, therefore said averments are material and relevant to the issues herein involved.

III.

SENIOR SURVEY CONTROLS.

It is manifest that there have been two surveys of the boundary line between these two states—one made in 1868 by Ehud N. Darling and the other made by Howard B. Carpenter in 1902. There are no allegations in the bill of complaint of a previous survey to that made by Carpenter, but it is clearly shown by the instructions given to Carpenter by the then acting Commissioner of the General Land Office, and the field notes of Carpenter, which are made a part of the bill that there was an original survey made of this line by Darling in 1868. The Carpenter survey was not an original survey, but simply a *resurvey*.

No authority is shown for his survey other than that he entered into a contract with the United States to "resurvey re-establish and re-mark the boundary line between Colorado, and the Territories of New Mexico and Oklahoma." Among the instructions given to him are the following:

"You will begin your resurvey by proceeding to a

point not less than 20 miles east of the corner established and recognized as the S. W. corner of Colorado." (Pages 3 and 4 of the Bill.)

"Where lines of public surveys have been closed upon the Darling line, you will not attempt to eradicate the closing corners, but will endeavor to find and obliterate all evidences of the mile corners re-established by subdividing and other deputy surveyors in restoring the position of the Darling line."

"You will, however, leave standing the monuments now standing on the line between Colorado and Oklahoma, except those set by Darling. All evidences of corners or monuments set by Darling on south boundary of Colorado will be carefully obliterated." (Page 8 of the Bill.)

The Carpenter survey as shown by the oaths of his assistants and by Carpenter himself, purports to be a "re-survey of the South Boundary of the State of Colorado." (Pages 11 to 16, inclusive, and pages 347 to 349, inclusive, of the Bill.)

His contract and instructions were not to locate and establish the 37th parallel of North latitude, but to "resurvey, reestablish and re-mark the south boundary of Colorado." As a matter of fact the boundary line was originally established by Darling in 1868, and that was the established and recognized boundary in 1902 when Carpenter made his survey, and is today. This is shown by defendant's answer and that the boundary line had been originally established by Darling is disclosed by the field notes of the Carpenter survey in which he says he "went to a point on the line between Colorado and New Mexico, as established by E. N. Darling in 1868; the point being near his 313th mile and at his astronomical monument No. 10, which is a block of sandstone about 10 x 15 feet and 10 feet high, marked Colorado on N., 1868 on E., N. Mex. on S., and 37 N. L. on W. from which another block of sandstone bears N. 20° W. 130 Lks. dist. marked Colorado 1868." (Page 17 of Bill.)

In the final oath of Carpenter at page 350 of the bill he says:

"I have destroyed such evidences as I have been able to find, of corners, monuments originally established on said line by E. N. Darling, U. S. Surveyor."

So it is evident that two surveys have been made; that the Darling line is the senior survey by more than 30 years, and was the originally established boundary line between said states.

Instead of re-surveying, re-establishing and re-marking the said boundary line, Carpenter attempted a new fixation of the 37th parallel of north latitude independent of the line established by Darling in 1868, and the apparent purpose of his survey was to correct supposed defects in the Darling survey. These two surveys differ materially.

New Mexico contends that the Carpenter survey sets forth the true boundary line. Colorado contends that the true boundary line is as shown by the survey of Darling in 1868.

The real question now for this Court to determine is not which of the two surveys is correct, but where is the boundary line, as originally located, whether correctly located or not. It is not to make or create a new boundary line, but for the court to determine where the boundary line is, not where it ought to be, and when ascertained, to establish it by a final decree. It is immaterial which of the two surveys is correct.

The Carpenter survey should not prevail for the following reasons:

1. It is not shown to have been made by proper authority.

"It is the acts done on the ground by the surveyor in pursuance of lawful authority which constitutes the survey."

5 Cyc., p. 949.

"A survey is not usually admissible in evidence as showing the location of boundaries if it does not appear that it was made by proper authority."

4 R. C. L., Sec. 54, p. 116.

2. It was simply a re-survey, and does not purport to be the line as originally established.

"Original corners, as established by the government surveyors, if they can be found, or the places where they were originally established, if they can be definitely determined, are conclusive, without regard to whether they were located correctly or not."

5 Cyc. 873.

Washington Rock Co. v. Young, 29 Utah, 108, 80 Pac. 382.

"The law is well settled that an original survey of lands, upon the faith of which property rights have been based and acquired, controls over surveys subsequently made which injuriously affects such rights."

29 Utah 108, 118.

In Clement v. Parker, 125 U. S. 309, 332, it was said:

"It is unquestionably true that a junior survey can not control or enlarge the dimensions of a senior survey. We understand this to mean, that when the location of a survey is or can be ascertained and determined by its own marks upon the ground, its own calls and courses and distances, it can not be charged or controlled or enlarged or diminished by the marks or lines of an adjoining junior survey; but when, from the disappearance of these original landmarks, caused by time and other agencies, from the senior survey, the location of a particular line, or the identity of a corner, is left in uncertainty or becomes the subject of controversy, then the original and well established marks found upon a later survey made by the same surveyor about the same time, and adjoining the one in dispute, are regarded as legitimate evidence, not to contest or control, but to elucidate, throw light upon, and thus aid the jury in discovering the exact location of the older survey."

1 Dembitz on Land Titles, Sec. 4.
5 Cyc. 874, 875.
4 Am. & Eng. Enc. of Law, 787.
Goodman v. Myrick, 5 Ore. 65.
Payne v. English, 79 Calif. 540, 21 Pac. 952.
Irvin v. Rotramel, 68 Ill. 11.

Clement v. Northumberland Coal Co., 87 Pa St. 290.

Hubbard v. Busy, 80 Calif. 281, 22 Pac. 214.

Nesselrode v. Parish, 59 Iowa 570, 13 N. W. 746.

Billingsley v. Bates, 30 Ala. 376, 66 Am. Dec. 126.

A subsequent survey can not alter or control an original survey, for so far as it can be traced or proved it must govern.

In Diehl v. Zanger, 39 Mich. 601, 605, when the first survey of lots involved in litigation was made by one Campau, and a re-survey, made after the disappearance of the monuments of the original survey, is for the purpose of determining where they were; and not where they should have been. In delivering the opinion Mr. Justice Cooley said:

> "Nothing is better understood than that few of our early plats will stand the test of a careful and accurate survey without disclosing errors. This is as true of the government surveys as of any others, and if all the lines were now subject to correction on new surveys, the confusion of lines and titles that would follow would cause consternation in many communities. Indeed, the mischiefs that must follow would be simply incalculable, and the visitation of the surveyor might well be set down as a great public calamity. But no law can sanction this course. The surveyor has mistaken entirely the point to which his attention should have been directed. The question is not how an entirely accurate survey would locate these lots, but how the original stakes located them. * * * The city surveyor should, therefore, have directed his attention to the ascertainment of the actual location of the original landmarks set by Mr. Campau, and if those were discovered they must govern. If they are no longer discoverable, the question is where they were located."

In the City of Racine v. Emerson, 85 Wis. 80, 81; 39 Am. St. Rep. 819, 55 N. W. 177, Mr. Justice Orton said:

"The fact, generally known and quite apparent in the records of courts, is that two consecutive surveys by different surveyors seldom, if ever, agree; and the greater number of surveys, the greater number of differences and disagreements will occur. When two surveys disagree, the correct one can not be determined by still another survey. It follows that resurveys are of very little use in such a case as this, except to confuse it."

"In re-surveying a tract of land according to a former plat or survey, the surveyors only function or right is to re-locate upon the best evidence obtainable, the corners and lines at the same places where originally located by the first surveyor on the ground. Any departure from such purpose and effort is unprofessional, and so far as any effect is claimed for it, unlawful."

Pereles v. Gross, 126 Wis. 122.

3. The original Darling line had been established by proper authority more than thirty years, and was the true and subsisting boundary line when the Carpenter survey was made.

4. The Carpenter survey was never accepted, nor confirmed by Congress nor by either of the States or Territories involved.

5. The Carpenter survey not only changes the boundary line between Colorado and New Mexico, but would require a change in the S. W. corner of Kansas and the N. W. corner of Oklahoma. The Carpenter line is one half mile north of the S. W. corner of Kansas, and N. W. corner of Oklahoma.

6. The adoption of the Carpenter survey would injuriously affect public and private rights based upon the original line established by Darling.

7. Carpenter was a trespasser upon territory over which Colorado then had dominion and exercised sovereignty, his survey was made without the consent of the State of Colorado, and his obliteration and destruction of corners and monuments of the boundary line then in existence and which had been es-

tablished more than thirty years prior to his survey, was illegal and unauthorized.

8. New Mexico is bound by the action of Congress in refusing to confirm or accept the Carpenter survey.

IV.

BOUNDARY WHEN COLORADO WAS ADMITTED INTO THE UNION AS A STATE.

The Darling line was the boundary at the time Colorado was admitted into the Union as a State in 1876. No other line was claimed by any of the interested parties. The Carpenter survey was not made until twenty-six years afterwards (1902).

The well-settled rule is that the boundaries of a state must be determined by what they were at the time of its admission into the Union.

Missouri v. Kentucky, 11 Wall. 395.
Indiana v. Kentucky, 136 U. S. 479.

New Mexico was admitted into the Union as a State January 5, 1912, and at that time its northern boundary was the Darling line, so when both states were admitted into the Union the Darling line constituted the boundary between them, and under the rule mentioned that must be determined to be the true boundary line, and Colorado is now and has been for many years prior to the commencement of this suit in the actual and exclusive possession of, and exercising dominion and sovereignty over the territory involved herein, to the Darling line.

V.

SUBDIVISION V.

This subdivision of the answer contains a plea in bar to the bill of complaint and reads as follows:

> "For further defense to said bill of complaint, this defendant avers that in the Act of Congress, approved March 3, 1875, to enable the People of Colorado to form a Constitution and State government, and be admitted

into the Union (18 Statutes at Large 474), and also by the Constitution adopted by the vote of the People of Colorado, and under which the State of Colorado was admitted into the Union by Proclamation of President Grant, August 1, 1876, the 37th parallel of North latitude between the 25th and 32nd meridians of longitude West from Washington, was fixed as the southern boundary line of that State; that pursuant to authority of an Act of Congress, approved March 2, 1867 (14 Statutes at Large 466) Ehud N. Darling, United States Surveyor and Astronomer, by the most approved methods of the time, surveyed and established in the year 1868 the 37th parallel of North latitude so far as it constituted the boundary line between the Territories of Colorado and New Mexico, and marked the same upon the earth's surface by mile corners and monuments, a copy of which survey, together with the field notes of his work is attached hereto and made a part hereof which field notes of said survey were examined and approved on the 30th day of April, 1869, by the Honorable Joseph S. Wilson, Commissioner of the General Land Office, as appears by his certificate to that effect attached to said field notes.

Defendant avers that for more than thirty (30) years, the position of the said Darling line remained undisputed, and the correctness of its technical execution unquestioned, and as so established the said Darling line has been generally recognized and acquiesced in by both of the States herein involved, and accepted by the Federal government, and is now recognized and accepted by the Federal government as the true and subsisting boundary line between Colorado and New Mexico; and by reason of the right and title acquired as hereinbefore set forth, this defendant from the time said boundary was so established in 1868 to the present time, has held lawful and rightful possession of and exercised dominion and sovereignty, and now claims the same, over the territory down to the said southern boundary line as estab-

lished by the said Darling, and no farther, county lines have been formed, towns and settlements have grown up, school districts, election districts, voting precincts, land districts and water districts have been created with reference to said line, public officers have been elected, property has been assessed, taxes levied and collected under the authority of the State of Colorado and its courts of both civil and criminal jurisdiction have exercised unquestioned jurisdiction in all places North of said boundary line, and the State of New Mexico has exercised a like jurisdiction in all places South of said line. County maps, State maps and maps prepared by the Federal government have for more than forty years last past delimitated said boundary according to said Darling survey, and government post offices have been established as being in Colorado when above said line, and in New Mexico when below said line, and public land surveys on both sides of said line were closed thereon, lands have been disposed of, rights acquired and political boundaries in both Colorado and New Mexico fixed by reference to said line.

The 37th parallel of North latitude, as established by Howard B. Carpenter, passes through several towns lying wholly within the State of Colorado, according to the boundary as originally surveyed by Darling, and along the entire line there is a material, and in many places, excessive variance between the lines of the two surveys, and the effect of said Carpenter survey if declared the true boundary line would be to remove a considerable strip of territory which is now within the State of Colorado, according to the Darling survey, and place it in the State of New Mexico.

The stone monument established by Capt. Macomb, U. S. A. of the Topographical Bureau in 1858, under direction of the War Department, marking the intersection of the 37th parallel of North Latitude with 103° of West Longitude from Greenwich, adopted as the initial point of the Darling survey, was designated as the

northwest corner of Indian Territory, now State of Oklahoma, 1874 by John J. Major, U. S. Surveyor and Astronomer, in the survey and marking of the boundary between Indian Territory and Colorado Territory. The line attempted to be established by Carpenter passed 93 lks. south of said Macomb monument and departed from the boundary lines established by both Darling and Major, and said Carpenter obliterated the marks upon said Macomb monument, theretofore and since hitherto recognized as the corner upon the south line of Colorado and common to the States of New Mexico and Oklahoma, and attempted to ré-locate said common corner at a point about two miles easterly from said long established and accepted Macomb monument.

The said Carpenter survey consisted of a new fixation of the 37th parallel of North latitude independent of the line established by Darling in 1868, and not only failed of confirmation by Congress, but the Federal government up to the present time has declined to recognize the said Carpenter survey as the true boundary line between the said two states, and on the contrary, has accepted and still accepts the said Darling survey as the true and correct boundary line between said two states.

All of which matters and things as hereinbefore stated, this defendant avers to be true and this defendant pleads the same in bar to the bill of complaint, and prays the judgment of the Court whether it shall further answer said bill.

Wherefore, having answered fully all the matters in plaintiff's bill set forth, defendant prays this Honorable Court that the prayer thereof be not granted, but that the Court decree that the boundary line between the State of New Mexico and the State of Colorado be, in accordance with said Darling survey, the true boundary line between the said two states, and that the said bill be dismissed and the defendant go hence with its costs in this behalf incurred, and that this defendant have such

other and further relief as may be found necessary and as to the Court shall seem meet and proper."

All of the foregoing averments of the answer are attacked by the motion to strike, except the last two paragraphs thereof.

VI.

FEDERAL CONSTITUTIONAL PROVISIONS AND POWERS OF CONGRESS.

Article IV, Sec. 3, of U. S. Constitution:

> "New states may be admitted by the Congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state, nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the Congress."

Subdivision 2 of Sec. 3, Art. IV, reads:

> "The Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State."

VII.

BOUNDARIES ACCORDING TO ENABLING ACTS AND STATE CONSTITUTIONS.

New Mexico was organized as a Territory on December 13, 1850. Its original area formed a part of the region transferred by Mexico to the United States by the treaty of Guadalupe-Hidalgo and by Texas. It was subsequently enlarged by the Gadsden Purchase. The formation of Colorado Territory in 1861, and of Arizona in 1863 reduced its area to its present limits.

The following clause from the Act of Congress creating the Territory gives its original limits:

"All that portion of the territory of the United States bounded as follows:

Beginning at a point in the Colorado River where the boundary line with the Republic of Mexico crosses the same; thence eastwardly with the said boundary line to the Rio Grande; then following the main channel of the said river to the parallel of the thirty-second degree of North latitude; then East with said degree to its intersection with the one hundred and third degree of longitude West of Greenwich; thence North with said degree of longitude to the parallel of thirty-eighth degree of North latitude; then West with said parallel to the summit of the Sierra Madre; then South with the crest of said mountains to the thirty-seventh parallel of North latitude; then West with said parallel to its intersection with the boundary line of the State of California; thence with said boundary line to the place of beginning—be, and the same is hereby erected into a temporary government by the name of the territory of New Mexico."

"Provided, That nothing in this Act contained shall be construed to inhibit the government of the United States from dividing said territory into two or more territories, in such manner and at such times as Congress shall deem convenient and proper, or from attaching any portion thereof to any other territory or state."

Act Sept. 9, 1850, Ch. 49, 9 Stat. L. 447.

New Mexico was admitted into the Union January 6, 1912. The Enabling Act does not define the boundaries thereof, but as fixed in the Constitution when admitted they are as follows:

Beginning at the point where the thirty-seventh parallel of north latitude intersects the one hundred and third meridian west from Greenwich; thence along said one hundred and third meridian to the thirty-second parallel of north latitude; thence along said thirty second parallel to the Rio Grande, also known as the Rio Bravo del Norte, as it existed on the ninth day of September, one thousand eight hundred and fifty; thence,

following the main channel of said river, as it existed on the ninth day of September, one thousand eight hundred and fifty, to the parallel of thirty one degrees forty seven minutes north latitude; thence west one hundred miles to a point; thence south to the parallel of thirty one degrees twenty minutes north latitude; thence along said parallel of thirty one degrees twenty minutes, to the thirty second meridian of longitude west from Washington; thence along said thirty second meridian to the thirty-seventh parallel of north latitude; thence along said thirty-seventh parallel to the point of beginning."

Colorado was organized as a Territory on February 28, 1861, with the limits which it has at present, being made from portions of Utah, New Mexico, Kansas and Nebraska. It was admitted into the Union as a State August 1, 1876, and the following clause from the Enabling Act and Article 1 of its Constitution when admitted, fixes its limits:

"The boundaries of the State of Colorado shall be as follows: Commencing on the thirty-seventh parallel of North latitude, where the twenty-fifth meridian of longitude west from Washington crosses the same; thence north, on said meridian, to the forty-first parallel of north latitude; thence along said parallel, west to the thirty-second meridian of longitude west from Washington; thence south, on said meridian to the thirty-seventh parallel of north latitude; thence along said thirty-seventh parallel of north latitude to the place of beginning."

VIII

NEW MEXICO IS BOUND BY THE ACTS OF THE UNITED STATES.

At the time Colorado was admitted into the Union as a State, and also at the time of the admission of New Mexico as a state, the United States were committed to the Darling line as the boundary between said states, and the State of New Mexico is bound by such recognition and adoption, and it must

aside by the condition of its predecessor, and is estopped, and can not now be heard to disavow the Darling line as its true northern boundary.

A newly formed state is bound by the acts of its predecessor, the Government of the United States, in regard to matters of boundary, which had plenary jurisdiction over the subject as long as the state remained a territory.

Missouri v. Iowa, 7 How. 660.
Missouri v. Kentucky, 11 Wall., 395.

In Missouri v. Iowa, 7 How. 660, 870, this Court said:

"The new state of Iowa came into the Union December 27, 1847, and up to this date she was bound by the acts of her predecessor, the United States, forasmuch as the latter might have directly conceded to Missouri a new boundary on the north, as was done on the west; and so likewise, Iowa is bound by the acts and admissions of the United States, tending indirectly to confirm and establish a particular line as the northern boundary of Missouri. * * *

The country north of the State of Missouri was for a time attached to the Territory of Michigan, and then to the Territory of Wisconsin. By the act of June 12, 1838 (Ch. 96), it was formed into a separate territorial government by the name of Iowa. And by another act of the same date (Ch. 100), the territory was formed into two land districts, the southern one embracing the country in dispute.

And on the Iowa side, the public surveys were executed, and lands were sold up to Sullivan's northern line. Nor had the Surveyor General of Illinois and Missouri any jurisdiction to go beyond it north; nor the surveyor's department of Iowa, to cross it by surveys to the south. From the time that Missouri became a state to this day, Sullivan's line has been recognized by the United States as the true northern boundary of Missouri, so far as it could be done through the department of public lands."

And thirdly, Congress, as early as 1834, organized a territorial government bounded by said line, laid off counties bounded by it on the south, as early as 1836, and governed the territory for ten years up to that time—all the time recognizing it as the proper northern boundary of Missouri.

From these facts it is too manifest for argument to make it more so, that the United States were committed to this line when Iowa came into the Union. And, as already stated, Iowa must abide by the condition of her predecessor, and can not now be heard to disavow the Old Indian Line as her true southern boundary. * * *

We are, therefore, of opinion that the northern boundary of Missouri is the Osage Line, as run by Sullivan in 1816 from the northwest corner, made by him, to the Des Moines River, and that a line extended due west from said northwest corner to the Missouri River, is the proper northern boundary on that end of the line. And this is the unanimous opinion of all the judges."

And the following language is quoted from the decree:

"And the Court further finds, that the State of Iowa is estopped from setting up claim to a line south of the old Indian boundary, known as Sullivan's line, as said State, by her cross-bill, assumed to do; because her predecessor, the United States, by many acts, and by uniform assumptions, up to the time when Iowa was created, in December, 1846, recognized and adopted Sullivan's line as the proper northern boundary of the State of Missouri; and that the State of Iowa is bound by such recognition and adoption."

In the case of Oklahoma v. Texas, decided April 11, 1921, this court held that the State of Oklahoma which had succeeded to the governmental jurisdiction formerly held by the United States over the Territory from which the state was formed, is in privity with the United States with respect to such Territory, so that a decree in a former suit between the United States and Texas regarding the boundary of the Territory is binding on both states in a subsequent suit between them.

IX

LONG POSSESSION AND ACQUIESCENCE.

Assuming the averments of subdivision V, included within the motion to strike, to be true, it appears, and is admitted by complainant, that by proper authority, and by the most approved methods of the time, the 37th parallel of north latitude so far as it constituted the boundary line between the Territories of New Mexico and Colorado was surveyed, established, and marked upon the earth's surface by mile corners and monuments, by E. N. Darling, United States Surveyor and Astronomer, in the year 1868, and that the same was examined and approved by the Commissioner of the General Land Office in 1869.

And further that for more than thirty (30) years the position of the said Darling Line remained undisputed, and the correctness of its technical execution unquestioned, and that as so established the said Darling Line had been generally recognized and acquiesced in by both Colorado and New Mexico, and accepted by the Federal Government, and is now recognized by the Federal Government as the true and subsisting boundary line between Colorado and New Mexico, and that Colorado has held lawful and rightful possession of and exercised dominion and sovereignty, and now claims the same, over the territory down to the said southern boundary as established by Darling, and no farther, ever since the year 1868. This is conclusive upon the complainant and is a complete bar and defense to the bill of complaint.

New Mexico is not only bound by the acts of the United States in recognizing and adopting the Darling survey as the true boundary but is also estopped by the doctrines of long possession, prescription, laches and acquiescence from now asserting a different boundary line.

AUTHORITIES.

In Rhode Island v. Massachusetts, 4 Howard 591, decided in 1846, it was alleged by Rhode Island that there was a mistake in the location of the boundary line between said states. The bill was dismissed. The Court said:

> "More than two centuries have passed since Massachusetts claimed and took possession of the territory up to the line established by Woodward and Saffrey. This possession has ever since been steadily maintained, under an assertion of right. It would be difficult to disturb a claim thus sanctioned by time, however unfounded it might have been in its origin. * * * Surely this, connected with the lapse of time, must remove all doubt as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time, and fall with the lives of individuals. For the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be involved with greater justice and propriety than in a case of disputed boundary."

In 1890, there was a boundary controversy between the States of Indiana and Kentucky over a tract of land called "Green River Island." In Indiana v. Kentucky, 136 U. S. 479, 510, it was said in the opinion of the Court delivered by Mr Justice Field:

> "This long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the island is more potential than the recollections of all the witnesses produced on either side. Such acquiescence in the assertion of authority by the State of Kentucky, such omission to take any steps to assert her present claim by the State of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome, except by the clearest and most unquestioned proof. It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority."

The court also referred to the case of Rhode Island v. Massachusetts and quoted therefrom with approval that part of the opinion relating to the long possession of Massachusetts and the delays in alleging any mistake in the action of the colonies, which we have hereinbefore set forth.

The Court adds:

"Vattel in his Law of Nations, speaking on the same subject, says:

> 'The tranquillity of the people, the safety of States, the happiness of the human race do not allow that the possessions, empire and other rights of nations, should remain uncertain, subject to dispute and ever ready to occasion bloody wars. Between nations, therefore, it becomes necessary to admit prescription founded on length of time as a valid and incontestable title.' Book II, c. 11, Sec. 149. And Wheaton in his International Law, says: 'The writers on natural law have questioned how far that peculiar species of presumption arising from the lapse of time, which is called prescription, is justly applicable as between nation and nation; but the constant and approved practice of nations shows that by whatever name it be called, the uninterrupted possession of territory or other property for a certain length of time by one State excludes the claim of every other in the same manner as, by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the article of property in question. Part. II, c. IV, Sec. 164.' * * * 'The long acquiescence of Indiana in the claim of Kentucky, the rights of property of private parties which have grown up under grants from that State, the general understanding of the people of both States in the neighborhood, forbid at this day, after a lapse of nearly a hundred years since the admission of Kentucky into the Union, any disturbance of that State in her possession of the island and jurisdiction over it'."

The doctrine laid down in the foregoing cases was adhered to in the case of Virginia v. Tennessee, 148 U. S. 503, decided in 1892.

It was claimed by Virginia that by the charters of the English sovereigns, under which the colonies of Virginia and North Carolina were formed, the boundary line between them was intended and declared to be a line running due west from a point on the Atlantic Ocean on the parallel of latitude thirty-six degrees and thirty minutes north; that the State of Tennessee, having been created out of the territory formerly constituting a part of North Carolina, the same boundary line continued between her and Virginia, and also that the boundary line claimed by Tennessee does not follow this parallel of latitude but varies from it by running too far North so as to unjustly include a strip of land about one hundred and thirteen miles in length, and varying from two to eight miles in width, over which she asserts and unlawfully exercises sovereign jurisdiction.

Tennessee contended that the boundary line, as declared in the English Charters, between the colonies of Virginia and North Carolina was run and established by commissioners appointed by Virginia and Tennessee after they became States of the Union, by Virginia in 1800 and by Tennessee in 1801; that the line they established was subsequently approved in 1803 by the legislative action of both States, and has been recognized and acted upon as the true and real boundary between them ever since until the suit was filed—a period of more than 85 years. Tennessee, further contended that the line thus established and acted upon was not open to attack as to its correctness but must be held to be the true boundary line between the States, even though some deviations from the line of the parallel of latitude thirty-six degrees and thirty minutes north may have been made by the commissioners in the measurement and demarcation of the line. The decision was adverse to Virginia. The Court held:

> "A boundary line between States or Provinces, as between private persons, which has been run out, located and marked upon the earth, and after-

wards recognized and acquiesced in by the parties, for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant, and the line so established takes effect, not as an alienation of territory, but as a definition of the true and ancient boundary. Lord Hardwicke, in Penn. v. Lord Baltimore, 1 Vesey Sen. 444, 448; Boyd v. Graves, 4 Wheat. 513; Rhode Island v. Massachusetts, 12 Pet. 657, 734; United States v. Stone, 2 Wall. 525, 537; Kellogg v. Smith, 17 Cush. 375, 382; Chenery v. Waltham, 8 Cush. 327; Hunt on Boundaries, (3rd Ed.), 306."

The Court adds:

"There are also moral considerations which should prevent any disturbance of long recognized boundary lines; considerations springing from regard to the natural sentiments and affections which grow up for places on which persons have long resided; the attachment to country, to home and to family, on which is based all that is dearest and most valuable in life." * * *

"The compact in this case having received the consent of Congress, though not in express terms, yet impliedly, and subsequently, which is equally effective, became obligatory and binding upon all the citizens of both Virginia and Tennessee. *Nor is it any objection that there may have been errors in the demarcation of the line which the States thus by their compact sanctioned. After such compacts have been adhered to for years neither party can be absolved from them upon showing errors, mistakes or misapprehension of their terms, or in the line established; and this is a complete and perfect answer to the complainant's position in this case.*" (Italics ours.).

In Louisiana v. Mississippi, 202 U. S. 1, 53, Mr. Chief Justice Fuller, delivering the opinion of the Court, said:

"Moreover, it appears from the record that the various departments of the United States Government have recognized Louisiana's ownership of the disputed area; that Louisiana has always asserted it; and that Mississippi has repeatedly recognized it, and not until recently has disputed it.

The question is one of boundary, and this Court has many times held that, as between the States of the Union, long acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it should be accepted as conclusive, whatever the international rule might be in respect of the acquisition by prescription of large tracts of country claimed by both. Virginia v. Tennessee, 148 U. S. 503; Indiana v. Kentucky, 136 U. S. 479; Missouri v. Kentucky, 11 Wall. 305; Rhode Island v. Massachusetts, 4 How. 591."

One of the leading cases is that of Maryland v. West Virginia, 217 U. S. 1, decided in 1910. The boundary in controversy runs between the two states from the headwaters of the Potomac to the Pennsylvania line. The facts involved that portion of the boundary between the two States lying between Garrett County, Maryland, and Prescott County, West Virginia. The bill charges that the State of West Virginia is in possession of and exercising jurisdiction over a large part of the territory rightfully belonging to Maryland; that the true line of the western boundary of Maryland is a meridian running south to the first or most distant fountain of the Potomac River, and that such true line is several miles south and west of the line which the State of West Virginia claims, and over which she has attempted to exercise territorial jurisdiction.

The State of West Virginia, in setting up her claim concerning the boundary in dispute, states that the true boundary line, long recognized and established is the one known as the "Deakins" line, and in the answer and cross-bill filed by her, she prays to have that line established as the true line between

the States. This case, similar in many respects to the case at bar, contains a review of the authorities which we have cited, and following such previous decisions, the Court, in a clear and exhaustive opinion by Mr. Justice Day, reaffirms the doctrine uniformly laid down and recognized as applicable to cases of this kind, and freely quotes therefrom.

In substance, it holds that where possession of territory has been undisturbed for many years a presumptive right arises which is equally binding under the principles of justice on States and individuals; that even if a meridian boundary line is not astronomically correct, it should not be overthrown after it has been recognized for many years and becomes the basis for public and private rights of property.

After referring to the doctrine laid down by this Court in previous cases, and quoting from standard authors in support thereof, the opinion adds:

> "An application of these principles can not permit us to ignore the conduct of the States and the belief of the people concerning the purpose of the boundary line known as the old state, or Deakins line, and to which their deeds called as the boundary of their farms, in recognition of which they have established their allegiance as citizens of the State of West Virginia, and in accordance to which they have fixed their homes and habitations. * * *.
>
> The effect to be given to such facts as long continued possession 'gradually ripening into that condition which is in conformity with international order,' depends upon the merit of individual cases as they arise. I Oppenheim International Law, Sec. 243. In this case we think a right, in its nature prescriptive, has arisen, practically undisturbed for many years, not to be overthrown without doing violence to principles of established right and justice equally binding upon States and individuals. Rhode Island v. Massachusetts, 12 Pet. 657. * * *.
>
> Upon the whole case, the conclusions at which we have arrived, we believe, best meet the facts disclosed

in this record, are warranted by the applicable principles of law and equity, and will least disturb rights and titles long regarded as settled and fixed by the people most to be affected."

According to the foregoing authorities, and the well-settled doctrine applicable to boundary cases, which has been repeatedly pronounced by this court in the clearest and most positive terms, the averments of the answer which are attacked by the motion to strike are not only material and relevant, but are a complete answer and defense to the bill of complaint.

We respectfully submit that the motion to strike should be overruled and the said averments of the answer held to be sufficient in law, upon which we pray the judgment of the court.

Respectfully submitted,

VICTOR E. KEYES,
Attorney General of the State of Colorado.
CHARLES ROACH,
Deputy Attorney General.
WILLIAM R. RAMSEY,
Assistant Attorney General.
Solicitors and of Counsel for the Defendant

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Office Supreme Court
OCT 4 1921
JAMES

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

~~No. 12~~ #4 Original.

THE STATE OF NEW MEXICO

vs.

THE STATE OF COLORADO.

MOTION.

Now comes the State of Colorado, the above named defendant, and moves the court to set down for hearing and oral argument, upon a day certain and convenient to the court, the complainant's motion to strike out certain parts of the defendant's answer.

THE STATE OF COLORADO,
By VICTOR E. KEYES,
Attorney General,
Solicitor and of Counsel for the State of Colorado.
CHARLES ROACH,
Deputy Attorney General,
WILLIAM R. RAMSEY,
Assistant Attorney General,
Solicitors and of Counsel for the State of Colorado.

Post Office Address: Denver, Colorado.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 19. ORIGINAL.

THE STATE OF NEW MEXICO

vs.

THE STATE OF COLORADO.

NOTICE.

To the State of New Mexico, complainant herein, and to Honorable Frank W. Clancy, special counsel for said Complainant:

You will please take notice that the defendant in the above entitled cause will, on Saturday, the 23d day of July, A. D. 1921, or as soon thereafter as the said court shall be in session and counsel can be heard, move the court to set down for hearing and oral argument the complainant's motion to strike out certain parts of the defendant's answer. A copy of defendant's said motion is annexed hereto.

THE STATE OF COLORADO,
By VICTOR E. KEYES,
Attorney General for the State of Colorado.
CHARLES ROACH,
Deputy Attorney General;
WILLIAM R. RAMSEY,
Assistant Attorney General,
Solicitors and of Counsel for said Defendant.

SANTA FE, NEW MEXICO.

Service of the foregoing notice, by the receipt of a copy thereof, together with a copy of the motion mentioned therein, is hereby acknowledged this twenty-fifth day of July, A. D. 1921.

FRANK W. CLANCY.

[Endorsed:] Supreme Court U. S. October term, 1921. Term No. 19, original. The State of New Mexico, complainant, *vs.* The State of Colorado. Motion to set for hearing motion to strike out parts of answer, notice, and proof of service. Filed July 25, 1921.